No. 85-552

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY, INC., and TOP ENTERPRISES, INC.,

Petitioners,

—against—

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY, AND THE GOVERNMENT OF THE UNINCORPORATED TERRITORY OF GUAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE

Table Of Authorities ii

Brief For Respondents In Response To The Brief For The United States As *Amicus Curiae* 1

APPENDIX

A. Puerto Rico Organic Act § 37 ..... A-1

B. Brief for Appellant, *Buscaglia* v. *Ballester* (Excerpt) A-2

TABLE OF AUTHORITIES

Cases: PAGE

Ambros, Inc. v. *Maddox*, 203 F. Supp. 934 (D. Guam 1962) 4

Buscaglia v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947) 4, 5

Downes v. *Bidwell*, 182 U.S. 244 (1901) 4

Constitutional Authorities:

Article I, Section 8, Clause 3 4

Statutes:

Guam Organic Act, 48 U.S.C.
§§ 1421-1428 2
§ 1421b 2
§ 1421b(a) 2
§ 1421b(d) 3
§ 1421b(e) 3, 4
§ 1421b(f) 3, 4
§ 1421b(g) 3
§ 1421b(n) 3
§ 1421b(u) 3, 4
§ 1423a 2

Economic Development of Territories Act, Pub. L. No. 98-454, Title VIII, 98 Stat. 1741 (1984) 4

Guam Tax Laws Act, Pub. L. 92-606, 86 Stat. 1494 (1972) 4

Puerto Rico Organic Act, § 37, 48 U.S.C. § 821 (repealed) 5, A-1

Other Authorities:

Brief for Appellant, *Buscaglia* v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947) 5, A-2

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INTRODUCTION

The Solicitor General agrees with the Government of the Unincorporated Territory of Guam, the Guam Airport Authority, and Duty Free Shoppers, Ltd. ("respondents") that the federal antitrust laws do not apply to the government of Guam, and that the challenged conduct does not constitute an undue burden on interstate or foreign commerce. These

grounds warrant denial of the petition for a writ of certiorari, and the Solicitor General concludes that "[t]he petition for a writ of certiorari should be denied." Brief at 13. These are not, however, the only reasons for denying the petition.

Although he did not need to address the issue in light of his ultimate conclusion, the Solicitor General also asserts that he finds evidence of Congressional intent to apply the negative implications of the Commerce Clause to the government of Guam in language "not yet focused on by the parties or considered by the courts below." Brief at 7. He refers to the provision in the Guam Organic Act which provides that the power of the Guam Legislature shall extend to all subjects of "local application," 48 U.S.C. § 1423a, and argues that, "during the general time period that Congress drafted [the Organic Act]," the word "local" suggested an intent to impose the dormant Commerce Clause. Brief at 7.

Respondents respectfully disagree with this portion of the Solicitor General's brief, and submit this brief to set forth some of the reasons for their disagreement. The authorities cited by the Solicitor General accord no such meaning to the word "local," and other circumstances confirm the error of that argument. Respondents contend that the inapplicability of the dormant Commerce Clause to the government of Guam provides additional cause for the petition to be denied.

1. The Solicitor General recognizes "Congress' express intent not to apply the Constitution generally" to Guam. Brief at 7. Rather, the Guam Organic Act, 48 U.S.C. §§ 1421-1428, imposes a variety of Constitutional limitations on the government of Guam by specific enumeration. 48 U.S.C. § 1421b (printed in Appendix B of the principal brief of the Guam Airport Authority and Duty Free Shoppers, Ltd.) sets forth this list, using language that unequivocally expresses Congressional intent. For example, it provides that

> (a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the

> press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.
>
> . . . .
>
> (d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.
>
> (e) No person shall be deprived of life, liberty, or property without due process of law.
>
> (f) Private property shall not be taken for public use without just compensation.
>
> (g) In all criminal prosecutions the accused shall have the right to a speedy and public trial. . . .
>
> . . . .
>
> (n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.
>
> . . . .

A 1968 amendment to the Guam Organic Act imposed additional Constitutional limitations on the government of Guam, again in unmistakable language:

> (u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

48 U.S.C. § 1421b(u).

In light of this lengthy and express enunciation of Constitutional limitations, it is not appropriate to infer that Congress intended to incorporate the negative implications of the Commerce Clause in a different section of the statute by use of a code word, rather than through the clear language it used in applying many other provisions.

This view is supported by the case law in effect at the time of the enactment of the Organic Act. By 1950, it was well settled that certain provisions of the Constitution, *viz.*, "the general prohibitions . . . in favor of the liberty and property of the citizen," applied to the government of a territory by their own force. *See Downes* v. *Bidwell*, 182 U.S. 244, 339 (1901) (concurring opinion). But, the First Circuit had held that the Commerce Clause has no such effect. *Buscaglia* v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947). Under these circumstances, if Congress had intended in 1950 to apply the Commerce Clause to the government of Guam, it surely would have articulated that intent in a manner at least as clear and straightforward as it did with regard to, for example, the rights of due process (48 U.S.C. § 1421b(e)) and just compensation (48 U.S.C. § 1421b(f)).

Moreover, in 1962 the District Court of Guam refused to apply the negative implications of the Commerce Clause to the government of Guam, even though the "local application" language of the Organic Act had been in effect since 1950. *Ambros, Inc.* v. *Maddox*, 203 F. Supp. 934, 937 (D. Guam 1962). When it enacted § 1421b(u) in 1968, Congress had an easy opportunity to overrule *Ambros*, if it believed that decision to be contrary to the intent of the "local application" language. Congress did not include Article I, § 8, cl. 3 in the Guam Organic Act at that time. Nor has it done so since, despite a number of subsequent amendments to the Organic Act. *E.g.*, Economic Development of Territories Act, Pub. L. No. 98-454, Title VIII, 98 Stat. 1741 (1984); Guam Tax Laws Act, Pub. L. 92-606, 86 Stat. 1494 (1972).

2. The Solicitor General contends that, during the general time period the Organic Act was drafted, the word "local" was a "term of art" that suggested application of the negative implications of the Commerce Clause. However, at that time, in a virtually identical context, the United States Government recognized no such significance in that word.

Buscaglia v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947), involved the question whether the negative implications of the Commerce Clause applied to the then Territory of Puerto Rico. Section 37 of the Puerto Rico Organic Act contained a provision substantively identical to the "local application" language of the Guam Organic Act. *See* 48 U.S.C. § 821 (repealed) (set forth as Appendix A hereto) (legislative authority of the territory applied to "all matters . . . not locally inapplicable").

The brief for the Treasurer of Puerto Rico in the First Circuit in *Buscaglia* was filed in April 1947 by attorneys of the United States Departments of Justice and the Interior. That brief specifically rejected (as did the First Circuit) the argument that Congress had applied the negative implications of the Commerce Clause to that territorial government:

> [A]s the court below correctly held, the Commerce Clause . . . does not apply to Puerto Rico and does not restrict the power of the insular legislature. . . . Again, Congress has not chosen to impose upon the insular legislature the restrictions of the Commerce Clause. . . .

Brief for the Appellant in *Buscaglia* (an excerpt of which is set forth as Appendix B hereto), at 12-13.

3. Congress did not in the Organic Act apply the negative implications of the Commerce Clause to Guam. As the Solicitor General agrees (Brief at 6), absent such Congressional application, that constitutional provision does not limit the government of Guam.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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